

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: Peter S. Tsimortos

Land Use Permit Application #2W1127-EB

Memorandum of Decision and Order

This proceeding involves an appeal from the denial of Land Use Permit Application #2W1127 and accompanying Findings of Fact, Conclusions of Law, and Order (Commission Decision), issued by the District 2 Environmental Commission (Commission) to Peter S. Tsimortos (Tsimortos) relative to the previous construction of a residence, garage, stables, caretaker's quarters and barn, the clearing of 12.5 acres of land, the improving of 1,800 feet of roadway, construction of a new wastewater disposal system and installation of underground electrical utility line on a 62.5 acre tract of land in the Town of Dover, Vermont (Project).

I. History

The history of this matter through April 7, 2003 appears in the Board's Findings of Fact, Conclusions of Law, and Order of that date.

On May 7, 2003, Tsimortos filed a Motion to Alter the Board's April 7, 2003 decision.

On May 21, 2003, the Board deliberated on Tsimortos' motion.

II. Discussion

A. Tsimortos' Motion to Alter

Tsimortos' motion and its accompanying memorandum, to which the other parties have not responded, raises several arguments:

1. the Board should alter certain Findings of Fact;
2. that the Board should vacate its decision pursuant to 10 V.S.A. §6089(a)(3), Environmental Board Rule (EBR) 40 and principles of due process because the Board should have held a hearing on the criteria;
3. the evidence and the Findings of Fact do not support the Board's conclusions as to 10 V.S.A. §6086(a)(8) (Criterion 8);
4. the Board's conclusions as to the written community standard factor under Criterion 8 are in error;
5. the Board applied the incorrect Dover Town Plan to the Project;
6. the Project complies with the Dover Town Plan and the Windham Regional Plan; and

7. the Windham Regional Plan conflicts with the Dover Town Plan and therefore should not be given effect.

B. Analysis

In the Findings of Fact which appear in its decision, the Board relied only on the prefiled direct testimony and exhibits submitted by Tsimortos. No evidence was submitted by the other parties to this case, nor were Tsimortos' filings subject to cross-examination. While the Board fails to see how the uncritical acceptance of Tsimortos' evidence results in a denial of Tsimortos' rights to a hearing under the statute, the Board's Rules or due process principles, the Board will respect Tsimortos' desire to be afforded a *de novo* hearing on the issues raised in his Notice of Appeal.

In an effort to expedite this matter, the Board will address, at this time, only Criterion 10. Following the Board's decision on Criterion 10, should a hearing or other proceedings be necessary for decisions on Criteria 8 and 9(K), they will be scheduled accordingly.

Criteria 1(B) and 4

No party has objected to the Board's decision as it relates to Criteria 1(B) and 4, and the Board finds that reopening its decision on these criteria would serve no purpose, as Tsimortos is the only party which has stated an interest in these criteria. Therefore, the Board's decision on Criteria 1(B) and 4 stands as issued.

Criterion 9(K)

The Board did not decide Criterion 9(k), and therefore no action is required on this criterion at this time.

Criterion 8

The Board vacates its decision on Criterion 8. Should it be necessary to address this criterion at a later date, the Board will afford all parties the opportunity to file evidence, exhibits and argument on this criterion.

Criterion 10

The Board vacates its decision on Criterion 10.

The Board has determined that, in this instance, only the Dover Town Plan (version to be determined), the Dover zoning bylaws, and the Windham Regional Plan constitute the evidence relevant and necessary to reach a decision.

The Board will consider the points raised by Tsimortos in his Motion and Memorandum in Support of his Motion to Alter to constitute legal argument as to Criterion 10. The Board invites the other parties to respond to this argument and Tsimortos' proposed alterations to the Findings of Fact relevant to Criterion 10

III. Order

1. The Board's decisions as to Criteria 1, 4 and 9(K), as stated in its April 7, 2003 Findings of Fact, Conclusions of Law, and Order, stand as issued.
2. The Board's decisions as to Criteria 8 and 10, as stated in its April 7, 2003 Findings of Fact, Conclusions of Law, and Order, are vacated and will be reconsidered.
3. On or before **Wednesday, June 18, 2003**, parties may file responsive briefs to the arguments as to Criterion 10 raised in Tsimortos' Motion to Alter and accompanying Memorandum.
4. On or before **Wednesday, June 18, 2003**, Tsimortos may file a brief to supplement arguments raised in his Motion to Alter and accompanying Memorandum.
5. On or before **Wednesday, July 2, 2003**, parties may file responsive briefs to any briefs filed pursuant to paragraphs 3 and/or 4 above.
6. On or before **Wednesday, June 18, 2003**, parties may request oral argument as to Criterion 10. If requested by any party, oral argument will take place **on July 16, 2003** from 10:00 – 11:00 a.m. Tsimortos and the Town of Dover will share 30 minutes; the Agency of Natural Resources and the Windham Planning Commission will share 30 minutes.

Dated at Montpelier, Vermont this 29th day of May 2003.

ENVIRONMENTAL BOARD

Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
*Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson

* Board Member Nowak dissents from this decision.